

No. 15607

United States
Court of Appeals
for the Ninth Circuit

F. M. BISTLINE and ANNE BISTLINE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division.

FILED

AUG 26 1957

PAUL P. G. EN, C



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States of America
for the District of Idaho, Eastern Division
1887

F. M. BISTLINE and ANNE BISTLINE, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff alleges:

I.

This action arises under the Internal Revenue Laws of the United States of America and more particularly the provisions thereof authorizing actions for the recovery of income tax unlawfully collected.

II.

That at all times hereinafter mentioned the defendant, United States of America, was, and now is, a corporation sovereign and body politic.

III.

That the plaintiffs are now, and at all times hereinafter mentioned, were husband and wife, and filed a joint income tax return for the year 1948.

IV.

That on or before the 15th day of March, 1949, plaintiffs herein filed an income tax return on Form 1040 for the year 1948, in the office of the Collector of Internal Revenue for the District of Idaho, showing among other things that in the calendar year 1948 they disposed of capital assets held for more than six months, which were reported in Schedule D of said return in words and figures as follows:

F. M. Bistline, et ux., vs.

Kind of Property	Date Acquired	Date Sold	Sales Price	Cost	Expenses of Sale	Gain
Lots 5, 6, 7, 8, Block 1, Park Addition to Alameda, Bannock County, Idaho	1938	4-14-48	\$ 25.00	\$ 5.00	None	\$ 20.00
Lots 18 & 19, Block 353, Pocatello	1936	4-28-48	100.00	30.00	None	70.00
Interest in tract in SE $\frac{1}{4}$ Sec. 12; and the NE $\frac{1}{4}$ of Sec. 13, T 6 South, Range 33, EBM	1937	5-14-48	9,019.66	300.00	None	8,719.66
One-half int. in S $\frac{1}{2}$, Block 4, Inglenook Acres, Bannock County	1938	10-22-48	2,000.00	100.00	\$200.00	1,700.00
Block 40, Pocatello Townsite, Bannock County, Idaho	1939	5-25-48	900.00	10.00	None	880.00
One-half int., Lots 11, 12, Block 41, Poca- tello	1943	5-25-48	100.00	10.00	None	90.00
Lot 16, Bl. 27, Pocatello	1939	5-13-48	100.00	10.00	None	80.00
One-fourth int. in Lot 13 and N 20' 12, Block 381, Pocatello	1936	1- 3-48	125.00	10.00	25.00	90.00
One-fourth int. S 10' Lot 12, all Lot 11, and N. 10' Lot 12, Block 381, Pocatello	1936	5-21-48	125.00	10.00	25.00	90.00
One-half int. in Lots 1, 2, 13, 12, 14, 15, 16, Block 16, Downey, Bannock County, Idaho	1943	3-19-48	103.58	25.00	10.00	68.58
$\frac{1}{2}$ int. L. 23, 24, Bl. 2, Inglenook Acres	1938	6- 3-48	500.00	150.00	50.00	300.00
$\frac{1}{2}$ int. in N $\frac{1}{2}$ Lot 22, S $\frac{1}{2}$ Lot 23, Block 4,

That in addition to the foregoing the Commissioner included in plaintiffs' 1948 income tax return the following item as a sale of "Property Other than Capital Assets," same being described therein as follows:

Vacant Lots—18 Block 168, Date Acquired: 1940; Date Sold: 1948; Sales Price: \$1,850.00; Cost: \$1,699.46; Gain: \$150.54.

V.

That plaintiffs had a total profit on the sale of said capital assets of \$12,592.82, from which they realized a long term capital gain in the amount of fifty (50%) per cent thereof, to wit, \$6,296.41, which was included in plaintiffs' net return for said year 1948, and all lawful taxes thereon were duly paid.

VI.

That the Commissioner of Internal Revenue erroneously ruled that said sum of \$12,592.84 was not a capital gain, but resulted from the disposal of property held by the plaintiff primarily for sale to customers in the ordinary course of his trade or business.

VII.

That thereupon the commissioner assessed an additional tax against the plaintiff on the sum of \$6,296.41, together with interest thereon from March 15, 1949, to the date of payment, to wit, May 31, 1951, at the rate of 6% per annum.

VIII.

That in addition to the above items on which

plaintiffs seek a refund, the plaintiffs deducted from their 1948 income as ordinary and necessary business expense, and for which they claim a refund, the following items.

Tuition—Practicing Law Institute, New York City	\$ 70.00
Books for same and law office.....	70.00
Travel & Hotel—Pocatello, Idaho, to New York City to attend said Practicing Law Institute and Lions International Convention for F. M. Bistline.....	295.20

That said F. M. Bistline, one of the plaintiffs herein, is a practicing lawyer in Pocatello, Idaho, and as such, had under consideration in his office certain matters involving complicated questions of income tax and estate and gift tax matters, and it was necessary for him, in order to properly handle the same; that said expenses were directly connected with and proximately resulted from the practice of his said profession; that the said books referred to above were paper pamphlets of a temporary nature, subject to frequent revision. That said F. M. Bistline is a member of the Lions Club of Pocatello, and the expenses incurred in connection with attending said convention were necessary and ordinary in connection with the furtherance of his profession; that said expenses would have been incurred in connection with the attending of said Practicing Law Institute, even if there had been no Lions convention.

IX.

That thereupon the commissioner assessed an additional tax against the plaintiffs on the sum of \$435.20, together with interest thereon from March 15, 1949, to the date of payment, May 31, 1951, at the rate of 6% per annum.

X.

That said Commissioner assessed an additional tax against the plaintiffs of \$1,768.91, and lawful interest thereon from March 15, 1949, in the amount of \$234.00, making a total of \$2,002.91, paid by plaintiff to the defendant as a result of said erroneous rulings of said Commissioner of Internal Revenue.

XI.

That on February 14, 1952, plaintiff duly filed a claim for refund of said additional tax and interest, a copy of which said claim is hereto annexed and marked "Exhibit A" and by reference made a part hereof. That said claim for refund was disallowed on April 8, 1953, and notice thereof received by plaintiff by registered mail on April 11, 1953.

XII.

Plaintiffs allege that said gain of \$12,592.83 was realized from the sale of their community capital assets held more than six months and that they have been unlawfully denied the right accorded by the Statutes in such cases made and provided to pay their income tax on one-half of said gain to wit, \$6,296.41, and that the plaintiffs have been denied

the right accorded by statutes to deduct ordinary and necessary business expenses in the sum of \$435.20, and that by reason thereof the defendant owes these plaintiffs \$1,768.91 for money had and received from the plaintiff on May 31, 1951, together with interest thereon from March 15, 1949, to said May 31, 1951, in the sum of \$234.00, making a total now owing by defendant to plaintiff of \$2,002.91, together with interest thereon at the rate of 6% per annum from May 31, 1951.

Wherefore, Plaintiff prays judgment against the defendant for the sum of \$2,002.91, together with interest thereon at the rate of 6% per annum from May 31, 1951, and such other and further relief as may be proper in the premises.

BISTLINE & BISTLINE,

By /s/ F. M. BISTLINE,

Attorneys for Plaintiffs.

EXHIBIT "A"

Form 843

U. S. Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: (Date received) [Blank].

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Idaho,
County of Bannock—ss.

Name of taxpayer or purchaser of stamps:

F. M. Bistline and Anne Bistline, husband and wife.

Street address:

351 North Garfield Avenue.

City, postal zone number, and State:

Pocatello, Idaho.

1. District in which return was filed: Idaho.

* * *

3. Kind of tax: Income Tax for calendar year 1948.

4. Amount of assessment, \$3,470.30; dates of payment, 3-15-49—5-31-51.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on May 31, 1953.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxable net income for year 1948, on which claimants paid tax—from R.A.R. (Lloyd T. Ralphs), dated February 21, 1950.....	\$16,202.86
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Less capital gains from sales of real estate held by taxpayers for more than 6 months, treated as ordinary income on R.A.R. 2-21-50.....	6,308.91
--	----------

Less following expenses of F. M. Bistline disallowed as deductions:

Tuition—Prac. Law Inst., N. Y. \$70.00, Books for same and law office \$70.00.	140.00
Travel & Hotel, Pocatello to N. Y., to attend this Prac. Law. Inst. and Lions International Convention—one half for each.....	295.20

Credited Income	\$ 9,458.75
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Income Tax Paid for 1948..	\$ 3,470.30
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Income Tax as corrected....	1,772.16
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To Be Refunded.....	\$ 1,698.14
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I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the

best of my knowledge and belief is true, correct and complete return.

See attached sheet for reasons.

/s/ F. M. BISTLINE,

/s/ ANNE BISTLINE.

Dated, 19...

Reasons

The sales which the Revenue Agent set up as Ordinary Gain, consisted of vacant lots in Pocatello, Alameda and Downey, Idaho, and one parcel, SE $\frac{1}{4}$, Sec. 12; NE $\frac{1}{4}$, Sec. 13; Sec. 7, T. 6 S., Range 33 E.B.M. All of this property except the rural tract was purchased for investment by taxpayer and wife between 1936 and 1943, when real estate prices were at a low level and made good investments.

Taxpayer F. M. Bistline is an attorney at law and all during 1948 was engaged in the practice of law and was not then and never has been a licensed real estate dealer and in no way attempted to obtain a market for said lots, and did nothing toward improving them or advertising them for sale, as is done with subdivisions.

This Property Was Not Held by Taxpayers or Either of Them for Sale to Customers in the Ordinary Course of Their or His or Her Trade or Business.

The property was purchased for investment in just the same manner as investors buy stocks or bonds and sell them at favorable prices.

Section 117 of the Internal Revenue Code has reference to persons engaged in the real estate business as dealers within the generally accepted meaning of a dealer in real estate, which means, the maintaining of an office and a persistent course of buying, advertising, selling, replacing, etc., and those other incidentals which go to make up a real estate business. None of this was done by taxpayers.

The SE $\frac{1}{4}$, Sec. 12, and NE $\frac{1}{4}$, Sec. 13; Sec. 7, T. 6 S., R. 33 E.B.M., was a piece of farmland consisting of 210 acres, more or less, owned jointly with Evans Investment Company, a corporation, which was purchased in 1937, and was part and parcel of a farming operation of said Evans Investment Company and taxpayers. It is ground that is under the Fort Hall Irrigation Project, for which water is expected from the Palisades Dam, and was sold only for the special purpose of providing a factory site for the Phosphorus Factory of the Westavaco Chemical Company. Had taxpayers not sold this to them, the probabilities are that this site would not have been located at its present location.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

Civil No. 1887

ANSWER

The defendant by its attorney, Sherman F. Furey, Jr., United States Attorney for the District of Idaho, answers the plaintiffs' complaint as follows:

1. The defendant denies the allegations of paragraph I of the complaint except to admit that this action has been brought under the Internal Revenue Laws of the United States of America for the recovery of income taxes lawfully assessed and collected from the plaintiffs.

2. The defendant admits the allegations of paragraph II of the complaint.

3. The defendant admits the allegations of paragraph III of the complaint.

4. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph IV of the complaint except to admit that plaintiffs filed a joint individual income tax return, Form 1040, for the year 1948 with the Collector of Internal Revenue for the District of Idaho, on March 15, 1949.

5. The defendant denies the allegations contained in paragraph V of the complaint.

6. The defendant denies the allegations contained

in paragraph VI of the complaint except to admit that upon examination of the plaintiffs' income tax return for the year 1948 the Commissioner of Internal Revenue determined that income realized by plaintiffs from the sale of certain pieces of real estate was taxable as ordinary income and not as a capital gain.

7. At the present time the defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VII of the complaint.

8. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph VIII of the complaint.

9. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph IX of the complaint.

10. At the present time defendant is without sufficient information to form a belief as to the truth of the allegations contained in paragraph X of the complaint, except that it is denied, that any of the Commissioner's rulings were erroneous.

11. The defendant denies the allegations contained in paragraph XI of the complaint except to admit that plaintiffs filed a claim for refund of income taxes for the year 1948 on February 12, 1952, with the Collector of Internal Revenue, District of

Idaho, and that such claim for refund was disallowed on April 18, 1953. Defendant further denies each and every allegation appearing in said claim for refund which is not otherwise expressly admitted in this answer.

12. The defendant denies each and every allegation contained in paragraph XII of the complaint.

Wherefore, the defendant having answered prays that judgment be entered dismissing the plaintiffs' complaint with prejudice, and that the defendant be awarded its costs and other relief which to the Court may seem just and proper.

/s/ JOHN T. HAWLEY,

Asst. United States Attorney.

[Endorsed]: Filed May 9, 1955.

In the United States District Court for the District
of Idaho, Eastern Division

No. 1885

ANNE BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1886

F. M. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1887

F. M. BISTLINE and ANNE BISTLINE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

The plaintiffs, husband and wife, filed these actions against the United States to recover income taxes which they aver were erroneously assessed and

collected. This Court has jurisdiction to decide these matters. 28 U.S.C.A. § 1346(a)(1).

Two issues are presented here: (1) Were the profits realized by these taxpayers from the sale of real estate properly taxed as ordinary income? (2) Were expenditures incurred by F. M. Bistline in traveling to and attending the Practicing Law Institute in New York City deductible as business expenses?

The taxpayers filed separate income tax returns for the years 1946 and 1947, and a joint return for 1948, in which they reported profits realized from the sale of real estate as long-term capital gains. The Internal Revenue Service reviewed those transactions, determined that during the years in question F. M. Bistline was engaged in the real estate business and held the said property primarily for sale to customers in the ordinary course of his business, and ruled that the gains from such sales constituted ordinary income.

During 1946 F. M. Bistline, in 15 separate transactions, sold 34 vacant lots for a net profit of \$10,950.26. He entered into seven sales in 1947 in which he disposed of 10 vacant lots and a 51.03-acre tract for a net profit of \$9,033. He participated in 12 transactions in 1948 involving the sale of 24 vacant lots, all of Block 40 in the city of Pocatello, Idaho, the south half of Block 4, Inglenook Acres, and a tract of land sold to the Westvaco Corporation, and made a net profit of \$12,291.74. The taxpayer, an at-

torney, has been admitted to practice in Idaho since 1920, and has maintained his own law office since 1923. The net income from his legal practice in 1946 amounted to \$860; in 1947, \$934.

The evidence shows that F. M. Bistline bought and sold substantial tracts of real estate during the past twenty years, both in his own behalf and in conjunction with others, and that he participated in two different "investment pools." In 1936 he and A. Y. Satterfield, a licensed realtor, bought, as co-owners, a number of city lots at county tax sales. Between 1936 and 1946 they made approximately 100 purchases and 100 sales of real property. In 1937 F. M. Bistline and Paul Evans, who is and has been in the real estate business for a number of years, purchased 3,000 acres of land in the "Michaud flats" area at a Power County tax sale. In 1939 they bought 77 acres in Bannock County, which subsequently became known as "Fremont Heights," from the receiver of the Citizens Bank and Trust Company.

Evans testified that all the property which they purchased jointly was held for sale "if the price was satisfactory."

Q: "That property [Fremont Heights] was being held for sale, too, wasn't it?"

A: "Naturally."

Q: "If the price was satisfactory?"

A: "Naturally."

Q: "Just like any of the other property you owned with Mr. Bistline?"

A: "So far as I am concerned anything is for sale if the price is right."

Q: "And you bought quite a bit of other property with him in Bannock County?"

A: "Some properties with him."

Q: "In Bannock County?"

A: "Yes."

Q: "And Power County?"

A: "Yes."

Q: "And your testimony that all this was held for sale if the price was satisfactory would apply to all these properties, wouldn't it?"

A: "I guess it would."

F. M. Bistline also admitted, on cross-examination, that he purchased large numbers of lots at tax sales with the intention of reselling them at a profit.

Q: "Now, in buying these lots would it be fairly correct to say you bought them with the intent to sell them at a profit?"

A: "I bought them with the hope of selling them at a profit."

The Bistline Realty Company, a corporation, was formed in 1937, and F. M. Bistline was elected president. In 1940, when the realty company moved into new quarters, he established his law office in the rear of the premises. His real estate holdings were listed in a card catalogue maintained in the company's office, and the final sales of this property were negotiated in his law office. Rolland H. Smith, then office manager of the realty company, testified as follows:

Q: "And I believe you said sometimes people would come in and inquire about those properties?"

A: "Yes."

Q: "And you told them they were available?"

A: "Yes."

Q: "Wasn't that what you testified to?"

A: "Yes."

Q: "And that is a fact?"

A: "Yes."

On December 31, 1945, F. M. Bistline moved his law office to another building in Pocatello, and sold his interest in the Bistline Realty Company to Smith. The former's real estate holdings continued to be listed in the company's card catalogue.

Property which a taxpayer holds primarily for sale to customers in the ordinary course of his trade or business is expressly excluded from the statutory definition of capital assets. Section 117(a)(1), Internal Revenue Code of 1939, 26 U.S.C.A., § 117(a)(1). "While the purpose for which the property was acquired is of some weight, the ultimate question is the purpose for which the property is held. *Richards vs. C.I.R.*, 9 Cir., 81 F. 2d 369, 106 A.L.R. 249." *Rollingwood Corporation vs. Commissioner*, 9 Cir., 190 F. 2d 263, 266. The facts necessary to create the status of one engaged in a "trade or business" depend primarily on the frequency or continuity of the transactions claimed to result in a "business" status. *Ehrman vs. Commissioner*, 9 Cir., 120 F. 2d 607, 610; *Rollingwood Corporation vs. Commissioner*, *supra*; *Palos Verdes Corp. vs. United States*, 9 Cir.,

201 F. 2d 256, 258-259; Stockton Harbor Industrial Company vs. Commissioner, 9 Cir., 216 F. 2d 638, 650, certiorari denied 349 U.S. 904, 75 S.Ct. 581, 99 L.Ed. 1241.

F. M. Bistline's sales of real estate during 1946, 1947 and 1948 were frequent and continuous. He admitted that he purchased a large number of lots with the purpose of reselling them for a profit. Paul Evans testified that the real estate he and F. M. Bistline purchased jointly was held for sale. Rolland H. Smith stated that the property owned by F. M. Bistline and listed with the Bistline Realty Company was "available" to prospective purchasers.

The plaintiffs have the burden of proving that the real estate sold during the years in question was held primarily for investment rather than primarily for sale. Cohn vs. Commissioner, 9 Cir., 226 F. 2d 22, 24. They have not met that burden. The Internal Revenue Service correctly treated the gains from such sales as ordinary income.

In July, 1948, F. M. Bistline and his wife traveled to New York City, where he enrolled in a two-week course in federal taxation at the Practicing Law Institute. He also attended the Lions Convention while in New York. F. M. Bistline's testimony is that his travel expenses for the trip to New York and his hotel expenses incurred while attending the institute amounted to \$295.20. It is undisputed that his expenditures for tuition and books totaled \$140. Those amounts, in the total sum of \$435.20, were deducti-

ble as business expenses. F. M. Bistline was reimbursed for his expenses incurred on the return trip and consequently such expenditures were not deductible.

Counsel for defendant may prepare findings of fact, conclusions of law and a proposed judgment, serve copies thereof upon counsel for the plaintiffs and submit originals to the Court for its approval.

Dated this 1st day of November, 1956.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed November 2, 1956.

[Title of District Court and Cause.]

Nos. 1885, 1886 and 1887

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

1. F. M. Bistline and Anne Bistline, husband and wife, are residents of Pocatello, Idaho.

2. F. M. Bistline and Anne Bistline filed separate income tax returns for the calendar years 1946 and 1947; they filed a joint income tax return for 1948.

3. The profit realized from the sale of certain real estate was reported on plaintiffs' income tax returns as long-term capital gains. After review of

plaintiffs' returns, the Commissioner of Internal Revenue determined that these profits were taxable as ordinary income. The Commissioner accordingly assessed and collected additional income taxes for these years.

4. F. M. Bistline is an attorney at law. He was admitted to practice in Idaho, in 1920, and has maintained his own law office since 1923. The net income earned from his legal practice in 1946, was \$860; in 1947, \$934.

5. In 15 separate transactions during 1946, F. M. Bistline sold 34 vacant lots for a net profit of \$10,950.26.

6. In 7 transactions during 1947, F. M. Bistline sold 10 vacant lots and a 51.03-acre tract of land for a net profit of \$9,033.

7. In 12 transactions during 1948, F. M. Bistline sold 54 vacant lots and a tract of land for a net profit of \$12,291.74.

8. During the past twenty years, F. M. Bistline purchased large numbers of vacant lots and other real estate with the intention of selling them at a profit to any prospective purchaser.

9. During the past twenty years F. M. Bistline has frequently and continuously sold a substantial number of vacant lots and other real estate.

10. F. M. Bistline was engaged in the real estate business during 1946, 1947 and 1948.

11. The properties sold by plaintiffs during 1946, 1947 and 1948 were held by them primarily for sale to customers in the ordinary course of F. M. Bistline's real estate business.

12. F. M. Bistline traveled to New York City in July of 1948, primarily to attend a two-week course in federal taxation at the Practicing Law Institute. His purpose in taking this course was not only to broaden his professional knowledge but also to enable him to handle a tax matter then pending in his office. The total of his non-reimbursed travel expenses for this trip and his hotel expenses while in New York City was \$295.20; his expenses for tuition and books, \$140. These expenses were incurred in the ordinary and necessary course of Mr. Bistline's legal practice.

13. By agreement of the parties, these cases were consolidated for the purposes of trial.

Conclusions of Law

1. The Court has jurisdiction of the parties to and subject matter of this action.

2. Profits realized from the sale of property held primarily for sale to customers in the ordinary course of a trade or business are taxable as ordinary income for federal income tax purposes. Whether property was being held for such purpose is a question of fact largely to be determined by the frequency, continuity and substantiality of the transactions involved. *Ehrman vs. Commissioner*, 120 F. 2d

607 (C.A. 9th); *Rollingwood Corp. vs. Commissioner*, 190 F. 2d 263 (C.A. 9th); *Palos Verdes Corp. vs. United States*, 201 F. 2d 256 (C.A. 9th); *Stockton Harbor Indus. Co. vs. Commissioner*, 216 F. 2d 638 (C.A. 9th), certiorari denied, 349 U.S. 904.

3. The real estate sold by plaintiffs during 1946, 1947 and 1948 was held by them primarily for sale to customers in the ordinary course of their business. The gain realized from these sales was accordingly taxable as ordinary income for federal income tax purposes.

4. The non-reimbursed expenses incurred by F. M. Bistline in attending the Practicing Law Institute in New York City are deductible for income tax purposes.

/s/ FRED M. TAYLOR,
District Judge of the United States District Court
of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed April 11, 1957.

In the United States District Court
for the District of Idaho

Civil No. 1885

ANNE BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1886

F. M. BISTLINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1887

F. M. BISTLINE and ANNE BISTLINE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

These cases being consolidated for purposes of trial, and plaintiffs having appeared in person by their attorney, Don R. Bistline, and the defendant

having appeared by Arthur L. Biggins, Attorney, Tax Division, Department of Justice, and the Court having considered the evidence, the pleadings, stipulation and briefs filed,

It Is Hereby Ordered and Adjudged that the plaintiffs recover of defendant \$122.04 plus interest as prescribed by law, this being the refund to which they are entitled for deductible expenses incurred when F. M. Bistline attended the Practicing Law Institute in New York City, and that the remainder of plaintiffs' claims are dismissed on the merits with each party to bear his own costs.

Dated at Boise, Idaho, this 10th day of April, 1957.

/s/ FRED M. TAYLOR,

United States District Judge,
for the District of Idaho.

Lodged April 5, 1957.

[Endorsed]: Filed April 11, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That F. M. Bistline and Anne Bistline, husband and wife, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on April 10, 1957, denying plaintiffs the right accorded by the

Statutes in such cases made and provided to pay their income tax on one-half of the gain realized by them on a sale during the year 1948 of a parcel of Real Estate which had been acquired by them in 1937 and referred in the complaint and described as follows: "Interest in tract in Southeast quarter Section 12 and the Northeast quarter of Section 13, Township 6 South, Range 33 E.B.M."

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

No. 1887—E

NARRATIVE STATEMENT OF TESTIMONY
AND PROCEEDINGS

The above-entitled cause came on regularly for trial on the 3rd day of May, 1956, upon the issues framed by plaintiffs' complaint and defendant's answer, R. Don Bistline, Beverly B. Bistline and F. M. Bistline appearing as counsel for plaintiffs-appellants and Arthur L. Biggins. appearing as counsel for respondent.

Plaintiff's Case in Chief

F. M. Bistline, plaintiff, called as a witness, being first duly sworn, testified as follows:

I am an attorney-at-law, and one of the plaintiffs in this case. My wife is the other plaintiff. I have bought and sold various types of real estate in and around Pocatello, Idaho. The purchases were particularly at tax sales beginning with the year 1936 through 1943, and the sales continued up to the present time. Defendant's Exhibits 2 and 5 are summaries of the recordings of various real estate transactions in the office of the County Recorder of Bannock County, Idaho, in which transactions plaintiffs were participants.

Exhibits 2 and 5 admitted by stipulation of the parties.

(Note: The trial court held that the plaintiffs held all of said property primarily for sale to customers in the ordinary course of their business and that the profits on the same were taxable as ordinary gain. There is no contest on this appeal as to all of the transactions involved in the three consolidated cases, except the tract described as "Interest in tract in SE $\frac{1}{4}$, Section, and the NE $\frac{1}{4}$ of Section 13, T. 6 South, Range 33 E.B.M." The appeal is taken solely on the sale of this last-described parcel of real estate. For this reason further detailed testimony is not included as plaintiffs concede the correctness of the trial court on all tracts except the above-described one—the appeal being only from that part of the judgment denying plaintiffs long-term capital gain benefits on said parcel. Reference to all other tracts and parcels is

therefore omitted from this narrative statement, and the statement is confined to evidence relating to said tract.)

Mr. Bistline, witness, continuing:

I was the owner of an undivided interest with J. Paul Evans in certain property which we sold to the Westvaco Company, in 1948 (described in the complaint as "Interest in tract SE $\frac{1}{4}$, Section 12, and the NE $\frac{1}{4}$ of Section 13, T. 6 South, Range 33 E.B.M.")

The circumstances of acquiring said tract were: Paul Evans' father, L. L. Evans, about the year 1915 and subsequent years on up to about 1919, purchased from competent Indians about 5,000 acres of ground on the Fort Hall Indian Reservation with the idea in mind of putting it under irrigation. He had gone so far as to put in the main ditch and his pumping plant. The main ditch itself went over this particular parcel. He got everything set to go. He was planning on buying water out of the American Falls Reservoir I understand, but in 1923 he met with financial reversals. He was president and a large stockholder in the First National Bank of American Falls. The bank failed and a very large number of lawsuits were brought against Mr. Evans and the stockholders and directors in that bank and resulting in judgments and that land was sold under execution.

In 1926 J. Paul Evans and his father came to my office. I believe that they had made a redemption of this land, and immediately after they had redeemed

it, it was noticed up for sale again on another sale. They came to me, and were going to redeem from this second sale. They did not redeem this particular piece however, as I recall it. I became interested in this because there was a vast amount of property involved and I convinced myself that these sales were held illegally, and that there was an excellent chance of setting aside the sales. I brought at least six or seven lawsuits on this, and in 1937 we had an appeal pending in the Circuit Court of Appeals on these lawsuits. These lawsuits were brought by the County on account of depository funds signed by these directors (of the First National Bank of American Falls) and Mr. Evans. This suit was pending in the Circuit Court of Appeals, and the County was holding a tax sale, and they put that property up for sale along with the tax sale of tax lands. Paul Evans and I made a bid on the property. We were the successful bidders and obtained our title then from the County, and subsequently dismissed our lawsuits after we purchased this land from the County at that sale.

From that time of acquisition in 1937 up until the time of the sale to the Westvaco Company the following was done with this property: There was one parcel there that had been in the Evans ownership a long time known as the Michaud Creek farmland, and it had a house on it, and always Evans always kept a man out there, and they were in the livestock business and used this particular land for livestock grazing. During World War II the airbase was just

across the highway and they came over and leased that for a rifle range. They just leased it by filing a notice of taking. They used it for a rifle range for about two years, and then it reverted back and was grazing ground again. I never had any interest in the livestock affairs, and I don't know to what extent it was used, but that was the general use of that land. We had numerous opportunities to sell to individuals. We never made a sale. In 1938, 1938 or 1940, I don't remember the year, but the City of Pocatello—we had the land immediately adjoining the west of their airport—wanted 80 acres. They could have condemned it if they had wanted to but we sold them 80 acres. I think it was about the next year that the Indian Service wanted to buy back 160 acres of land and restore it to the tribal lands. We sold that 160 acres back to them.

In 1940 on one of the tracts Paul Evans had drilled a well and was intending to farm it. This particular tract where he put the well I did not have any interest in, but we were working together on the deal, and before he got an opportunity to start farming the U. S. Air Force moved in and filed notice of taking 903 acres of that land, including the well. As soon as we could proceed again and in 1945 we went over to another tract and drilled another well to develop it, and we have been farming that since 1945. It is a 200-acre tract. I will back up and say that this land has long been contemplated of coming under the Palisades Project. There was an authorization for an irrigation system on that through the Indian Affairs Department in 1932 to

put that under water. It has always been our plan to hold that land and not sell it, however, when it was in the public interest we were willing to make a sale.

In 1943 Jack Simplot through an agent came to see us, and wanted to locate a factory site on some of this ground, and at that time we were very much pressured. Actually they wanted the site given to them. I remember the Secretary of the Chamber of Commerce and others came to see me. They got in touch with Evans and the Simplot people were determined they were not going to pay anything. They wanted the site given to them. Finally as an accommodation to them we agreed to sell them this ground for \$25.00 an acre, and did sell them the first 40 acres at \$25.00, but refused to sell them any more. Later they said they just had to have more ground, and we sold them another 40 acres. Now, those were the only sales that we made of any of this ground that we purchased at the county sale in 1937 at the time the land involved in this action was acquired, that is, that would be involved in this lawsuit. One was made later in 1953.

My contact with the Westvaco people came about in this way. My recollection is that I was in Tennessee and Judge Baum called me and said, "I think we have a hot deal coming up here, and that is that the Westvaco Company will want some of yours and Paul Evans' land for a factory site to make phosphorus or some such thing." I said "When I get back we can get together on the transaction," and then when I got back I got in touch with Paul Evans. We had numerous conferences with O. R.

Baum and representatives of the Westvaco Company. These were largely held in Judge Baum's office, and I don't remember how many months it was before we could finally get the thing worked out and get the deal made, but we finally did get the deal made and got paid for it.

We are still holding other land out there. I don't know what the last count is on it, but we have got 1,000 to 1,500 acres of it left.

As to any offers of purchase on that other land: We have had several. We have had people who have asked me to sell them land, particularly on this irrigated land out there, and we have flatly turned them down.

Since the sale of this piece of property to Westvaco, which was in the public interest, we have made one sale of a parcel of this land. This one sale was made in 1953. In 1953 Mr. Evans and I had been contemplating bringing another 80 acres under cultivation which cornered on the 200 we had in cultivation. However, Mr. Lindley had just put in a pressure system on the land which was immediately west of it, and had put in a main line of his pressure system right over to the edge of it. He came to us and talked us out of going ahead with it. He said he would like to buy it, and finally got the price where we figured it was better to sell to him than for us to go and develop the land and we sold it to him.

In answer to the question as to whether we have had any further offer from Westvaco: Yes, we have. Immediately after we sold this land to Westvaco we were called over to Baum's office again, and they

wanted the 160 acres lying immediately west of where their present plant is, and they gave us a written offer, and I believe I have that in my files and we flatly turned them down. This was and is a continuing and open offer, and they said that any time we want to take the offer we could. The price was higher than we sold the other ground for. We have refused to sell it.

Cross-Examination

By Mr. A. L. Biggins:

It is correct that Judge Baum called me someplace in Tennessee. I don't think he asked me if we were willing to sell the property. As I recall it he said it looked like Westvaco might put a factory here, and they had been looking for sites, and that they would like to consider purchasing this site, and that he wanted to talk to me about it when I got back, and that it was only in the beginning stages. And I told him that we were ready to negotiate on the property when I got back.

I don't know that it was immediately upon getting back that we entered into negotiations. As to whether there was much dickering, there wasn't so much. It was a matter of getting the sale closed. What I meant by dicker—in my previous testimony was that there was a matter of, or difficulty in getting the sale closed. We have several conferences with Baum. In the same telephone conversation Baum mentioned that Simplot wanted to buy some lots for an apartment house site (this is involved

in the case of Beverly B. Bistline vs. United States), and we had considerable dickering on that sale. I mean going back and forth and arriving at a price. We had to adjust the price back and forth several times.

J. PAUL EVANS

called as a witness by appellants, testified as follows:

Direct Examination

I live in American Falls and have lived there since 1907. I know F. M. Bistline, plaintiff in this case. I owned a half interest in the land sold to Westvaco along with F. M. Bistline. My father, I think, purchased that and all the other Michaud land around 1915 or 1916.

I recall beginning with the year 1926 through 1937, that I and my father and others had a lot of litigation about that Michaud land. I recalled that in 1937 this particular land was in the name of Power County and they put it up for sale, and that I and F. M. Bistline bid it in. It was bid in my part in the name of the Evans Investment Company. My interest was a half interest, and the other half interest was his.

I recall the plans we had with regard to the Michaud property. I planned on farming it and grazing it. I was running livestock at that time. I was using this for grazing and had been using it for grazing since we acquired it.

I do not know whether this particular piece of land that Westvaco bought was used by the Govern-

ment for a rifle range. It could have been on the quarter section next to it.

I never did place this property or any of the Michaud property on the market with a view of selling it. I have done considerable developing of that property out there. I put down the irrigation wells, and irrigated some 300 to 400 acres of land. The first well was put in 1940 or 1941. The one on the west side of the track next to the airbase, east of the airbase, was put in 1944, and I put another one down in 1948 on the south side, and then about two weeks ago I put another one down on the south side of the track. I intended to keep this property to farm it.

I recall the circumstances when that property was sold in 1948 to the Westvaco Company. Judge Baum and Jack Simplot came down to my house one evening and tried to buy it. Simplot said he thought he could locate some manufacturing plant in there. I told him so far as I was concerned it wasn't for sale right then, that I had a part interest and I would have to get in touch with F. M. Bistline, who was away and I wouldn't make any price at all to him at that time. Subsequently after F. M. Bistline returned he and I got together and discussed the matter and met with Baum and some of these Westvaco people, and finally gave them an option at about \$100 an acre for 210 acres, and subsequently the sale was made.

My recollection of the number of acres that was included in that land F. M. Bistline and I bought from Power County in 1937 was around 3000 acres.

that is more or less. We made no sales of any of the land purchased by us at that sale in 1937 except 80 acres for the airport, 160 acres to the Indian Reservation, I believe 120 acres to Jack Simplot. Also, 903 acres of it was condemned by the air force, but some of that 903 acres was my own. We did not make any other sales of that ground. I do not recall anybody approaching me with regard to buying the ground which Westvaco bought prior to 1948.

I recall after this sale was made to Westvaco we had a conference in Judge Baum's office and an offer was made to buy some more of that land. It was directly west adjoining the land that was a half mile west of the land we sold to Westvaco. Lindley had 160 acres in between we sold to Westvaco. This would be half mile west of the land we sold.

The paper which had been handed me marked "Plaintiff's Exhibit No. 3" is an offer made by the Westvaco Chlorine Corporation for some land out at Michaud. I recall that I received that at Judge Baum's office. I recall that there were several copies made of that. I think Judge Baum would have a copy, and they gave me this copy, and I think I turned the original over to F. M. Bistline. The signature on this proposed exhibit is that of W. T. Nichols. I was present when he signed that letter. I saw him sign it. The copy that I have here is a duplicate original. Mr. Nichols is an officer or someone connected with Westvaco Company. I think he was out of New York, if I remember right.

Plaintiff's Exhibit No. 3 was admitted without objections.

Referring to Exhibit 3 the parcels referred to therein are roughly 80 or 90 acres next to the railroad tracks which run a half mile from the corner of Lindley's land that Westvaco now own, directly west down to the railroad tracks and then another half mile or whatever it would be which jogs across the track due south. That is the first parcel and we were offered \$150.00 an acre. The next parcel would be land adjoining that on the south, and would run another 80 acres. They offered \$125.00

Part of the land is irrigated and part dry land and part grazing. The part that is grazing is back south of this last portion here that they offered \$125.00 an acre for.

That offer of Westvaco was never accepted. It is not for sale at present. None of the Michaud property is for sale so far as I am concerned.

Cross-Examination

By Mr. Biggins:

I am in the real estate business and have been for a number of years. It is not part of my job in the real estate business to run this Evans Investment Company. The Evans Investment Company is a corporation. F. M. Bistline got one share of stock when we organized the company. I do not know whether an examination of the corporate articles of that company would show the purchase of land to be within the scope of its business ac-

tivity. I have purchased land since I have been associated with that company and I think I have been very careful to be within its corporate articles. Originally one of the purposes of this company was not to purchase land, it was a family organization to raise livestock and farm. I think Mr. Bistline was one of the incorporators. I don't know what the articles state with regard to one of the purposes of the corporation being to buy land.

Since I have been connected with that company, just the one sale is all I ever bought—that tax sale, which included over 3000 acres. I don't think we bought anything else but this land in the name of Evans Investment Company, but I am not sure. This Company has sold real estate including the sale to Westvaco.

As to whether or not we entered into negotiations on a second sale, they made an offer we did not accept. This was in Judge Baum's office. F. M. Bistline and Mr. Nichols were present. We were talking about this second possible purchase. As to whether or not we just couldn't get together on price, well, it wasn't for sale at that time. They called me and asked Mr. Bistline to come up there. I didn't tell them over the phone I was not interested in selling. We could have gone up there to talk price.

Westvaco is on the right hand side of the highway coming from American Falls to Pocatello. Most of the other stuff is on the left side of the highway but about two and a half miles back from the highway.

I regard myself as a qualified real estate man. From a real estate man's point of view this piece of property was not the least satisfactory property in that tract. It was against a hillside. It was not on the wrong side of the highway for farming and stuff like that. We didn't have water there for farming at that time. We never did dry farm the piece sold to Westvaco.

We put in one well across the highway on the left-hand side. We have two wells on this (right-hand side).

I said Judge Baum and Jack Simplot came to see me about selling this property and I said so far as I was concerned I couldn't talk sale, and I didn't own all of it. I did not suggest or tell them to get ahold of Mr. F. M. Bistline. I told them I would have to talk to him, and when he got back I got together with him and with them and agreed on a price.

This is not the only land I ever bought with Mr. Bistline. We bought the land that is now Fremont Heights. My purpose in buying that was because I thought it was a good buy. My answer to your question as to whether or not it is right that I thought I could sell it for a profit, my answer is that anything I have I would sell for a profit including the Michaud Flats, if I wanted to. And including the sale to Westvaco. And including anybody who came into my real estate office if it was high enough I would sell it. As to whether or not that is exactly why I decided to sell to Westvaco, my answer is yes, if

the price is right anything I have is for sale. I am in the real estate business but the corporation isn't. I have been for a good many years. So far as I am concerned anything is for sale if the price is right. I bought some other properties with F. M. Bistline in Bannock County and Power County and I guess that my testimony that all of this was held for sale if the price was satisfactory would apply to all these properties.

Redirect Examination

By Mr. Bistline:

I previously testified and again testify that this piece that was sold to Westvaco was held for farm property and used for that purpose and we were expecting to use it as that, and that it was not for sale except under the circumstances mentioned here.

Mr. F. M. Bistline: It is hereby stipulated by and between counsel for the respective parties that the following statement is a true, correct and accurate statement of the facts therein stated, to be considered by the court in the trial and determination of the above-entitled cases in addition to the evidence adduced at the trial, and such other stipulations of evidence as may be in the record.

I.

That the three above cases (F. M. Bistline vs. U. S. No. 1884, Anne Bistline vs. U. S. No. 1885, and F. M. Bistline and Anne Bistline vs. U. S. No. 1887) are consolidated for the purpose of said

trial, and that all of the actions arise under the Internal Revenue Laws of the United States of America.

II.

That F. M. Bistline and Anne Bistline, the plaintiffs in all of the above cases were at the time of the commencement of this action, and ever since the 16th day of August, 1921, have been and now are husband and wife.

* * *

VII.

That on or before the 15th day of March, 1949, the plaintiffs jointly filed an income tax return on Form 1040 for the calendar year 1948, showing among other things that in said calendar year, 1948, they disposed of real properties held for more than six months, which were reported in Schedule D of their respective returns as follows as to description, date acquired, date sold, net gain and to whom sold:

Description	Date Acquired	Date Sold	Net Gain	To Whom Sold
Lots 5, 6, 7, 8, Block 1, Park Addition	1938	4/14/48	\$ 20.00	
Lots 18 & 19, Block 353	1936	4/28/48	70.00	
Interest in tract in SE $\frac{1}{4}$ Sec. 12; NE $\frac{1}{2}$ Sec. 13, T. 6 South, R 33, E.B.M.	1937	5/14/48	8,719.66	Westvaco Corp.
One-half int. S $\frac{1}{2}$, Block 4, Inglebrook Acres.....	1938	10/22/48	1,700.00	L. D. S. Church
Block 40, Poca.	1939	5/25/48	880.00	Empire Invest. Co.
$\frac{1}{2}$ int. Lots 11, 12, Block 41	1943	5/25/48	90.00	Empire Invest. Co.
Lot 16 Block	1939	5/13/48	80.00	Poc. Heights Corp. (Simplot Apts.)
$\frac{1}{4}$ int. Lot 13 and N. 20' 12, Block 381, Poca.	1936	1/ 3/48	90.00	
$\frac{1}{4}$ int. S 10' Lot 12, all of Lot 11 and N 10' Lot 12, Block 381	1936	5/21/48	90.00	
$\frac{1}{2}$ int. Lots 1, 2, 13, 14, 15, 16, Block 16, Downey, Idaho	1943	3/19/48	68.58	
$\frac{1}{2}$ int. L. 23, 24, Block 2, Inglenook Acres	1938	6/ 3/48	300.00	
$\frac{1}{2}$ int. in N $\frac{1}{2}$ Lot 22, S $\frac{1}{2}$ Lot 23, Block 4, Inglenook Acres	1939	9/ 2/48	183.50	

That the above property was vacant lots in the City of Pocatello except as otherwise indicated; that the first two parcels were by quit claim deed; that the last five parcels, with the exception of the Downey property, were made by A. Y. Satterfield in connection with a real estate development of said lots and other adjacent lands in Alameda, Bannock County, Idaho, that the sale of the Downey property was by quit-claim deed.

* * *

XVI.

That in the event the plaintiffs, or either of them, in the three actions, are found by the Court to be entitled to capital gain treatment of the properties in said cases involved, that judgment may be entered in each such action for the respective plaintiff or plaintiffs, in the amounts as prayed in said complaints, or proportionately in case some of the sales of some of the properties are held by the court not to be entitled to capital gain treatment, provided, however, that the amount of any such judgment shall be subject to the correct mathematical computation thereof in accordance with the Internal Revenue Laws of the United States of America in such cases made and provided.

/s/ F. M. BISTLINE.

/s/ BEVERLY B. BISTLINE.

/s/ R. DON BISTLINE.

Attorneys for Plaintiffs.

/s/ A. L. BIGGINS.

Attorney Dept. Justice.

Attorney for Defendant.

Appellant submits and files the above and foregoing as a true, full, correct and complete narrative summary statement of all of the testimony offered or received, and all the proceedings had in the trial court at and in connection with the trial of said cause, for use upon its appeal taken to the United States Court of Appeals for the Ninth Circuit.

Dated this 6th day of June, 1957.

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 6, 1957.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.

2. Answer.
3. Memorandum Opinion.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Notice of Appeal.
7. Statement of Points to Be Relied Upon by Appellant.
8. Narrative Statement of Testimony and Proceedings.
9. Designation of Matters to Be Included in Record on appeal.
10. Original exhibits Nos. 2, 3 and 5.
11. Order for Transmittal of Original Exhibits.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 20th day of June, 1957.

[SEAL] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15607. United States Court of Appeals for the Ninth Circuit. F. M. Bistline and Anne Bistline, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed June 24, 1947.

Docketed: June 28, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15607

F. M. BISTLINE and ANNE BISTLINE, Hus-
band and Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT

Following is a concise statement of the point upon which appellants intend to rely on the appeal of the above-entitled cause:

The District Court erred in entering judgment denying plaintiffs the right accorded by the Statutes in such cases made and provided to pay their income tax on one-half of the gain realized by them on a sale during the year 1948 of a parcel of real estate which had been acquired by them in 1937 and referred to in the complaint and described as follows: "Interest in tract in Southeast Quarter Section 12 and the Northeast Quarter of Section 13, Township 6 South, Range 33 E. B. M." and commonly referred to in the evidence as the "Westvaco Sale."

/s/ R. DON BISTLINE,

/s/ BEVERLY B. BISTLINE,

/s/ F. M. BISTLINE,

Attorneys for Plaintiffs-
Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1957.